STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

DELAWARE STATE UNIVERSITY CHAPTER	**)**	
OF THE AMERICAN ASSOCIATION OF	**)**	
UNIVERSITY PROFESSORS,	**)**	
Charging Party,	**)**	
	)	**ULP No. 97-12-224**
v.	**)**	
	)	
DELAWARE STATE UNIVERSITY,	**)**	
Respondent.	**)**	

Appearances

Jonathan G. Axelrod, Esq., Beins, Axelrod & Kraft, P.C., for AAUP
Noel E. Primos, Esq., Schmittinger & Rodriguez, for DSU

BACKGROUND

Delaware State University ("DSU") is a public employer within the meaning of §1302(n) of the Public Employment Relations Act, 19 Del.C. Chapter 13 ("PERA").

Delaware State University Chapter of the American Association of University Professors ("AAUP") is an employee organization within the meaning of 19 Del.C. §1302(i). The AAUP is the exclusive bargaining representative of Delaware State University's full-time "voting" faculty as defined by Delaware State University, including Departmental Chairpersons and Academic Directors, professional librarians, counselors, research faculty, extension agents, department and library assistants, and half-time faculty, within the meaning of 19 Del.C. §1302(j).

On December 19, 1997, the AAUP filed this unfair labor practice charge alleging that by its actions DSU violated §1307, Unfair Labor Practices subsection (a)(5) of the PERA, which provides:

> (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
>
> (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate bargaining, except with respect to a discretionary subject.

On January 9, 1998, DSU filed its Answer to the Charge, including New Matter, denying it had violated the statute. The AAUP filed its Response to New Matter on January 20, 1998.

The pleadings establish that AAUP bargaining unit member Dr. Raymond Grandfield filed an informal grievance (by letter dated May 28, 1996) with DSU Contract Administrator James Mims, concerning student grades which were changed by the Dean of the School of Business and Economics "... because the 'professor incorrectly assigned a grade for attendance -- in violation of the existing university policy.'" Dr. Grandfield asserted the "... Dean's actions are clearly a flagrant violation of Academic Freedom," and he requested the changes be disallowed until the grievance was adjudicated.

On June 8, 1996, Contract Administrator Mims completed an "Informal Interview - Grievance Form," as follows:

> The matter of the grade substitution has been discussed with the Vice President of Academic Affairs. Dr. Taylor indicated he would discuss this matter with the "Council of Deans" and recommended a policy to arbitrate grade disputes.
>
> Also as a result of the meeting with the Deans, Dr. Taylor will attempt to resolve the issue of grade changes for [*the two students*]. Complaint Exhibit 3.

In a Step I Grievance Form, dated June 18, 1996, Dr. Grandfield, asserts, "In essence, the Vice President [Mims] did not address the Informal Grievance I filed but rather his disposition is to meet with the Council of Deans to determine a policy." The grievance alleged violations of sections 2.6 and 12.3 of the parties' collective bargaining agreement, and of DSU's class attendance policy.

On or about March 4, 1997, DSU President Dr. William B. DeLauder issued a Step II Grievance Disposition of Dr. Grandfield's grievance:

> Findings

I. Dr. Grandfield's interpretation of the Class Attendance Policy is in conflict with the policy approved by the University Faculty (May 15, 1995). Dr. Grandfield's classroom grading and attendance policies (based on his interpretation) are in violation of the approved Class Attendance Policy.

II. Dr. Williams' actions (the changing of the two grades) while based on a valid premise (violation of university policy) could have been handled in a more appropriate manner.

Disposition: The Hearing Officer finds that Dr. Grandfield's classroom practice of giving a mark for attendance does in fact violate the University approved Classroom Attendance Policy (May 15, 1995). Dr. Grandfield is directed to bring his classroom attendance/participation practice into conformity with University rules and regulations. (Class Attendance Policy).

The Hearing Officer finds that Dr. Williams did exercise due diligence in the resolution of this matter. It, however, would have better [sic] to assemble a group of faculty (as a grade appeal panel) to review this situation and to make recommendations to both the Dean and faculty member. This would add a peer review element to the process. The University does not condone changing any faculty member's grade without due cause. Consideration of a grade change (by the University) shall only take place when there is a violation of a University Policy, rule or regulation and the faculty member ignores the policy, rule or regulation.

Remedy
The Vice President for Academic Affairs will be directed to formulate a policy for my review and approval that clearly delineates the procedure used in changing a faculty members' grades when it has been determined that the grading procedure violates University policy. Complaint Exhibit 5.

Unresolved, the matter proceeded to binding grievance arbitration pursuant to the parties' collective bargaining agreement. At the conclusion of the arbitration hearing on September 30, 1997, with the consent of the parties, the arbitrator verbally adopted Dr. DeLauder's Step II ruling and directed the University to establish a policy concerning the University's right to alter final grades submitted by faculty members. (Complaint, para. 8)

In a letter to DSU Contract Administrator Mims, also dated September 30, 1997, the AAUP President Dr. Jane Buck requested to negotiate the policy, stating:

> The Association has agreed to remand this case to the Vice President for Academic Affairs. However, because this is a negotiable issue, involving as

> it does a change in working conditions, the Association must be involved in negotiating the details of such a policy. Complaint Exhibit 6.

By letter dated October 3, 1997, AAUP Counsel confirmed AAUP's position concerning the negotiability of the grade change policy:

> With regard to the merits of Dr. Buck's position, let me reiterate the following: Arbitrator Stanley Aiges, with the consent of the parties, ordered the University to develop a procedure by which the Administration may change a grade assigned by a faculty member. At the arbitration hearing, the University adamantly refused to negotiate this issue with the Union and the order requires no such negotiation, although we fervently hope that the AAUP will be involved in the decision-making process.
>
> Without regard to the arbitration process and the Aiges Award, we believe that the AAUP has a statutory right to negotiate procedures for grade changes. Dr. Buck's letter was an assertion of that right. If you or Mr. Mims reiterates the University's position in the statutory context, the AAUP will take the issue of negotiability to the PERB for resolution. Complaint Exhibit 7.

By letter dated October 9, 1997, DSU proposed the following compromise in order to avoid litigation and to comply with the Arbitrator's award:

> Under this compromise, the Faculty Senate would formulate a proposed procedure to be used in changing a faculty member's grades when it is determined that the faculty member's grading procedure violates the University's policy. The Faculty Senate would then submit its proposal to the Vice President for Academic Affairs, who could either approve the proposal or develop a proposal of his own. If the Vice President for Academic Affairs approved the Faculty Senate's proposal, that proposal would be submitted to the President for his acceptance, rejection or modification. If the Vice President formulated his own proposal, both the Faculty Senate's proposal and the Vice President's proposal would be submitted to the President. The President, in accordance with the Step II remedy in the Grandfield case, would make the ultimate decision regarding the grading policy. Complaint Exhibit 8.

On November 10, 1997, Counsel for the AAUP sent a letter to Counsel for DSU which provides, in relevant part:

> . . . The Executive Board has rejected the view that the AAUP has no right to negotiate concerning the procedures for changing the grade assigned by a faculty member. As I am sure you can understand, faculty members regard the right to assign grades as an integral part of academic freedom. Protection of academic freedom is a negotiable issue under Delaware law. Complaint Exhibit 9.

By letter dated December 1, 1997, Counsel for the University informed the Counsel for AAUP, of the following:

> This is in response to your letter dated November 10, 1997. The University is not willing to enter into negotiations regarding the procedure to be used in changing a faculty member's grades when it has been determined that the grading procedure violates University policy. As stated in my October 9, 1997, letter, entering into negotiations over this issue would violate the terms of the President's Step II remedy and thus the Arbitrator's order. In addition, the development and implementation of such a procedure is a matter of inherent managerial policy, and accordingly the University is not required to engage in collective bargaining over it. Complaint Exhibit 10.

The parties agree that the pleadings adequately set forth the material facts and indicate the areas of disagreement between the parties regarding those facts. Based upon the pleadings, the parties filed responsive briefs setting forth their respective positions. The following decision results from the record thus compiled.

ISSUES

1. Is the procedure by which an administrator changes a student's final grade when it is determined that the faculty member who assigned the grade has violated the University's grading policy a mandatory subject of bargaining?
2. If so, did the AAUP, by its conduct at the arbitration hearing on September 30, 1997, by agreeing to the consent award, waive its right to bargain over such procedure?

PRINCIPAL POSITIONS OF THE PARTIES

AAUP: In its post-hearing brief, the AAUP characterizes the procedure at issue as one involving when and whether the grade assigned by a faculty member should be changed. The AAUP argues the formulation of the procedure for determining whether a faculty member's grade violated University

policy impacts upon the academic freedom of the faculty which, it argues, is a fundamental working condition.

Section 1302(e), of the Act requires collective bargaining over "terms and conditions of employment.":

> (e) "Collective bargaining" means the performance of the mutual obligation of a public employer through its designated representatives and the exclusive bargaining representative to confer and negotiate in good faith with respect to terms and conditions of employment, and to execute a written contract incorporating any agreements reached. However, this obligation does not compel either party to agree to a proposal or require the making of a concession.

Issuing grades is a significant part of a faculty member's responsibilities. Therefore, the procedure for determining the basis for overturning such grades is a term and condition of employment which must be bargained.

The AAUP acknowledges that the policy underlying the University's grading standards arguably involves "standards of service" but asserts it does not seek to bargain over that grading policy. Rather, it seeks only to bargain over the development of a procedure for determining whether a grade issued by a faculty member deviated from the policy.

If it is determined that the procedure in question qualifies as a standard of service as well as a working condition, then the balancing test adopted by the PERB in Woodbridge Education Assn. v. Bd. of Ed., Del.PERB, ULP 90-02-048, I PERB Binder 537 (1990) must be applied. The AAUP contends that the impact of changing a grade is far greater upon an individual faculty member than upon the University.

The AAUP asserts it did not waive its right to bargain by participating in and consenting to the resolution of the Grandfield grievance. The arbitration of the Grandfield grievance resulted in an award by Arbitrator Aegis which does not require DSU to negotiate with the Union. The Aegis award does, however, require the creation of a policy the subject of which is a mandatory subject of bargaining, under the Act.

DSU: DSU contends that rather than addressing "when and whether" a grade should be changed, the procedure to be developed by the Vice President of Academic Affairs pursuant to the arbitration decision by Arbitrator Aegis, involves only "how" a grade is to be changed after the University has determined the grade is inconsistent with the University's grading policy.

DSU argues a grading policy is a matter of inherent managerial policy which 19 Del.C. §1305 exempts from the duty to bargain. It also constitutes an exclusive prerogative of management pursuant 19 Del.C. §1302(q), about which the University is not required to bargain. The establishment and enforcement of a grading policy involves a "basic function" of management which is integrally involved with the University's "standards of service" and the "direction of personnel."

There is no impact upon individual faculty members in the performance of their responsibilities or upon their working conditions because it is the University administrators who are changing the grades, rather than mandating or requiring a faculty member to make the change. There is, therefore, no need to resort to the balancing test in order to determine whether this issue constitutes a term and condition of employment or an inherent managerial policy.

Alternatively, DSU argues that even if PERB finds this issue to be mandatorily negotiable, the AAUP waived its right to negotiate. During the grievance arbitration hearing on September 30, 1997, DSU was steadfast in its position that it would not negotiate the grade change procedure. The AAUP consented to DSU's position when it consented to the Grandfield arbitration award issued by Arbitrator Aegis. The award neither explicitly or implicitly requires DSU to negotiate this issue with the AAUP.

DISCUSSION

The issue raised by this unfair labor practice charge is whether the employer, DSU, is obligated under its statutory duty to bargain in good faith to negotiate with the AAUP over the development of procedures by which an administrator changes a student's grade where the faculty member violated the

University's policy in assigning the grade. The AAUP does not dispute DSU's right to adopt and implement a University-wide grading policy. AAUP's Opening Brief @12.

DSU argues that to enter into negotiations over a policy for administrative grade changes would violate the terms of the Arbitrator's award, which adopted the Step II grievance resolution. The Arbitrator's award, to which the parties consented, directs the Vice President for Academic Affairs to formulate a policy for the University President's "review and approval that clearly delineates the procedure used in changing a faculty member's grades when it has been determined that the grading procedure violates University policy." The narrow issue before the arbitrator in the Grandfield grievance was whether the Dean violated the Academic Freedom provisions of the collective bargaining agreement when he changed the final grades of two students, without faculty consent, because the faculty member had included consideration of the students' attendance in evaluating them for grades, in violation of DSU's policy on attendance.

The University's focus in this particular instance is too narrow. If, as the AAUP asserts, it has a right to negotiate over this issue under the PERA because it is a mandatory subject of bargaining, the scope of the grievance award is irrelevant. An arbitrator's decision interpreting the terms of a collective bargaining agreement cannot deprive a party of a statutory right, unless those terms constitute a clear and explicit waiver. That is not the case here.

A public employer and the exclusive representative of a certified bargaining unit of public employees are mutually obligated to confer and negotiate in good faith with respect to "terms and conditions of employment", which means "matters concerning or related to wages, salaries, hours, grievance procedures and working conditions." 19 Del.C. §1302(q). The Delaware Legislature clearly intended that all matters concerning or related to the specified terms and conditions of employment be manditorily negotiable. Appoquinimink Education Association v. Bd. of Education, Del.PERB, ULP 1-3-84-3-2A , I PERB Binder 35 (1984).

This broad scope of negotiability is, however, limited in two ways. First, issues may be reserved to the exclusive prerogative of the public employer (i.e., illegal subjects of bargaining) by either the PERA or another law.

Secondly, the statute creates a "permissive" category of bargaining, namely matters of "inherent managerial policy":

> A public employer is not required to engage in collective bargaining on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion or policy as the functions and programs of the public employer, its standards of services, overall budget, utilization of technology, the organizational structure and staffing levels and the selection and direction of personnel. 19 Del.C. §1305.

An employer is not required to negotiate with respect to matters of inherent managerial policy, but neither is the employer statutorily prohibited from bargaining such matters. Woodbridge Education Assn. v. Bd. of Education, Del.PERB, ULP 90-02-048, I PERB 537 (1990).

The PERB established in Woodbridge, an analysis for determining whether an issue is a mandatory subject of bargaining under Delaware's public sector collective bargaining laws. Application of that analysis to the specific facts and circumstances presented in this case follows:

A. Is the procedure by which an administrator changes a student's faculty-assigned final grade reserved to the exclusive prerogative of the public employer by the PERA or any other law?

There is no allegation in this matter that DSU is prohibited by either the PERA or any other law from negotiating the procedure in question. Neither party has provided any evidence or argument which would support a finding that this is an illegal subject of bargaining.

B. Do procedures for changing grades fall within the statutory definition of "terms and conditions of employment"?

The AAUP, citing Parate v. Isibar 868 F.2d 821 (6th Cir., 1989), asserts the procedure for changing grades constitutes a working condition which must be negotiated under the PERA. In Parate, the Court was asked to evaluate whether Professor Parate's First Amendment free speech right was violated when the institution's administrators compelled him to change a student's grade. The Court opined:

> [Parate] retains the right to review each of his student's work and to communicate, according to his own professional judgment, academic evaluations and traditional letter grades. Parate, however, has no constitutional interest in the grades which his students ultimately receive. If the defendant [*administrators*] had changed Student "Y's" "GSW" course grade, then Parate's First Amendment rights would not be at issue. Parate's First Amendment right to academic freedom was violated by the defendants because they ordered *Parate* to change Student "Y's" original grade. The actions of the defendants, who failed to administratively change Student "Y's" grade *themselves*, unconstitutionally compelled Parate's speech and precluded him from communicating directly his personal evaluation to Student "Y". Parate v. Isibor @ 829.

This charge does not raise a constitutional issue concerning academic freedom. Rather, it contends that the procedure by which DSU changes a faculty-assigned final grade is a working condition within the meaning of 1302(q), and therefore is mandatorily negotiable under the PERA. The Delaware PERB has held that a "working condition":

> . . . relates generally to the job itself, i.e., to circumstances involving the performance of the responsibilities for which one is compensated or the opportunity to and qualifications necessary to perform work required of those employees who are members of the certified bargaining unit. Smyrna Educators Assn. v. Bd. of Education, Del.PERB, D.S. 89-10-046 (I PERB Binder 475 (1990)).

The PERB further defined a "de facto" working condition to be one which an employee can avoid only by quitting his or her job. Smyrna Educators' Assn., v. Bd. of Education, Del.PERB, ADS 89-10-246 (I PERB Binder 521 (1990)). This agency has found disciplinary procedures adopted pursuant to a drug testing policy and a mandate that police officers wear protective vests to both be mandatory subjects of bargaining because employees were subject to discipline for not complying with these mandates and could avoid them only by resigning their employment. AFSCME Council 81 v. Del. Dept. of

Transportation, Del.PERB, ULP 95-01-111, II PERB Binder 1279 (1995); FOP Lodge 15 v. City of Dover, Del.PERB, ULP 98-08-241, III PERB Binder 1855 (1999).

The direct link between the process by which DSU administration may change a grade assigned by a faculty member to a student, based upon an individual grading policy which conflicts with the University's grading policy, and a "working condition" is not clear. The parties have discussed and negotiated concerning the broader category of "academic freedom" and have included provisions relating to academic freedom in their collective bargaining agreement, under Article XIII, Working Conditions.

The courts have recognized that "academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself." Regents of the University of Michigan v. Ewing, 474 US 214 (1985). The term academic freedom "is used to denote both the freedom of the academy to pursue its ends without interference from the government … and the freedom of the individual teacher … to pursue his ends without interference from the academy; and these two freedoms are in conflict." Piarowski v. Illinois Community College District 515, 759 F.2d 625 (7th Cir., 1985). Invoking the protection of academic freedom does not transform an issue into a question of working conditions. Simply placing provisions relating to academic freedom under the heading of "working conditions" does not create a presumption or assumption that any matter which can be related to "academic freedom" is a mandatory subject of bargaining because it is a working condition within the meaning of §1302(q) of the PERA.

The AAUP argues that "because issuing grades is a significant part of a faculty member's job, the procedure for determining the frequency and basis for overturning such grades is a mandatory 'term and condition' employment." The AAUP does not, however, provide the premises on which it bases this conclusion. The record does not support a finding that a faculty member's performance or working conditions are impacted when a student's final grade is changed by the administration when the faculty member's grading policy is in conflict with University policy. Indeed, the record concerning the

Grandfield grievance supports the conclusion that where bargaining unit members have a concern that grades were inappropriately changed, they are subject to review through the grievance process.

The procedure by which a student's final grade is administratively changed when a faculty member violates DSU's grading policy is not a term and condition of employment subject to mandatory negotiation under the Public Employment Relations Act.

C. Do procedures for changing grades constitute a matter of inherent managerial policy under §1305 of the Act?

The United States Supreme Court has recognized "four essential freedoms" of a unversity, namely, " to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." Regent of University of California v. Bakke, 438 US 265 (1978). Matters such as course content, homework load, and grading policy are key components of a university's standards of service. Lovelace v. Southeastern Massachusetts University, 793 F.2d 419 (1st Cir., 1986). Grading is pedagogic in nature, and the assignment of a grade is subsumed under the university's managerial right to determine how courses are to be taught. Brown v. Armenti, 247 F.3d 69 (3rd Cir., 2001).

The methodology and consistency of the University's grading system lie at the core of the University's standards of service, and are, therefore, matters of inherent managerial policy. Consequently, the procedure by which an administrator changes a student's final grade when it is determined that the faculty member has violated the University's grading policy in assigning that grade is a permissive subject of bargaining.

The University cannot be compelled to negotiate a permissive subject of bargaining with the AAUP (although it may voluntarily agree to do so). In this case, it is clear that the parties have discussed appropriate methods of faculty input into policy matters such as the grading policy. The AAUP acknowledges in its Reply Brief that "most, if not all, of the University's basic functions are performed by the faculty through the Faculty Senate, through Departments, or through Committees." AAUP Reply

Brief at p. 2. This understanding is contained within the parties' collective bargaining agreement, which provides:

> 19.1 (e) Both parties to this Agreement recognize the Faculty Senate as the primary body for insuring effective Faculty participation in the governance of the institution and providing the means for the Faculty to exercise its responsibilities.

Consequently, the parties have acknowledged in their agreement that the appropriate avenue for faculty input on policy issues is through the Faculty Senate.

In conclusion, because the procedure for administratively changing a student's final grade is a permissive subject of bargaining, it is unnecessary to address whether the AAUP waived its right to negotiate on this issue.

CONCLUSIONS OF LAW

1. Delaware State University is a public employer within the meaning of §1302(n) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994).

2. The Delaware State University Chapter of the American Association of University Professors is an employee organization within the meaning of 19 Del.C. §1302(i).

3. The AAUP is the exclusive bargaining representative, within the meaning of 19 Del.C. §1302(j), of DSU's full-time "voting" faculty (as defined by the University) including Departmental Chairpersons and Academic Directors, professional librarians, counselors, research faculty, extension agents, department and library assistants, and half-time faculty.

4. The procedure by which University administrators change a student's final grade, where the grading policy of the assigning faculty member violated University policy, is a matter of inherent managerial policy. As such, this issue is a permissive subject of bargaining, which DSU is neither required nor prohibited from negotiating with the AAUP.

5. DSU did not violate 19 Del.C. §1307 (a)(5) when it did not engage in negotiations on this issue.

WHEREFORE, because DSU was not required to negotiate this issue under the PERA, this unfair labor practice is hereby dismissed.

/s/Deborah L. Murray-Sheppard
DEBORAH L. MURRAY-SHEPPARD
Hearing Officer
Delaware Public Employment Relations Bd.

DATED: 2 August 2002